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IN THE

Supreme Court of the United States

October Term, 1963

No. 253

UNITED STATES OF AMERICA, *ex rel.*
HERMAN FREDERICK MARKS,

Petitioner,

against

P. A. ESPERDY, as District Director of the Immigration and Naturalization Service, New York District, United States Department of Justice,

Respondent.

PETITION FOR REHEARING

MURRAY A. GORDON,
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Of Counsel:
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against

P. A. ESPERDY, a District Director of the Immigration and Naturalization Service, New York District, United States Department of Justice,

Respondent.

PETITION FOR REHEARING

Petitioner presents his petition for a rehearing of the above-entitled cause, and, in support thereof, respectfully shows:

The United States Court of Appeals for the Second Circuit held in this habeas corpus proceeding that the petitioner had lost his native-born American citizenship pursuant to § 349 (a)(3) of the Immigration and Nationality Act of 1952 [8 U.S.C.A. 1481(a)(3)] and was a deportable alien by reason of service in the armed forces of a foreign state. 315 F. 2d 673. This Court granted certiorari. 375 U. S. 810. Argument in *Schneider* v. *Rusk*, No. 368, Oct. Term, 1963, involving the constitutionality of § 352 (a)(1) of the Immigration and Nationality Act of 1952 [8 U.S.C.A. 1484 (a)(1)], was set for argument immediately after argument in *Marks*. 32 U. S. L. W. 3163. On May 18, 1964, the challenge to the validity of § 352(a)(1) was sustained in *Schneider* (32 U. S. L. W. 4397), three Justices dissent-

ing and Mr. Justice Brennan taking "no part in the decision of this case" (32 U. S. L. W. 4400). That same day the judgment in *Marks* was affirmed without opinion by an equally divided Court, Mr. Justice Brennan taking "no part in the consideration or decision of this case" (32 U. S. L. W. 3399). For the reasons to be indicated the instant petition for rehearing is made and should be granted.

Grounds for Rehearing

I.

The allowance of certiorari here confirms the substantial and unresolved nature of the constitutional issues posed by this case. Affirmance by a divided Court and without opinion leaves those issues unsettled. The Court's function to decide and to state the grounds for decision in those cases which the Court deems to warrant review is frustrated by judicial deadlock, and rehearing, an otherwise rarely granted remedy, has most frequently been granted for the purpose of breaking such a deadlock. See, *e.g.*, *United States* v. *One 1936 Model Ford V-8*, 305 U. S. 564, 666; *Gray* v. *Powell*, 312 U. S. 666, 313 U. S. 596; *Toucey* v. *New York Life Ins. Co.*, 313 U. S. 538, 596; *Commercial Molasses Corp.* v. *New York Tank Barge Corp.*, 313 U. S. 541, 596; *Baltimore & Ohio R. Co.* v. *Kepner*, 313 U. S. 542, 597; *New York, C. & St. L. R. Co.* v. *Frank*, 313 U. S. 588, 596; *Halliburton Co.* v. *Walker*, 326 U. S. 696, 327 U. S. 812; *Bruces Juices, Inc.* v. *American Can Co.*, 327 U. S. 758, 812; *MacGregor* v. *Westinghouse Co.*, 327 U. S. 758, 812; *Indian Towing Co.* v. *United States*, 349 U. S. 902, 926; *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic Steamship Corp.*, 349 U. S. 901, 926; see also Stern and Gressman, Supreme Court Practice (3 ed. 1962), pp. 386-387. Rehearing to avoid a failure of function is particularly appropriate here.

As matters now stand the issue whether Marks was constitutionally expatriated and rendered stateless has not

been the subject of conclusive independent appellate disposition. The Second Circuit here found "great force in the constitutional arguments presented by" Marks, but felt "constrained by the superior authority of *Perez* v. *Brownell*, 362 U. S. 44 * * *, to affirm the determination of alienage" (315 F. 2d, at p. 675). No other grounds were cited below in support of the validity of § 349(a)(3). It is, however, now doubtful whether *Perez* is "superior authority" on the issue of the "power of Congress to take away citizenship for activities done by the citizen * * * absent expatriation by the voluntary renunciation of nationality and allegiance" (*Schneider, supra*, 32 U. S. L. W., at p. 4399). The majority opinion in *Schneider* states that the view that such power "is non-existent * * * has not *yet* commanded a majority of the *entire* Court" (*ibid.*) (emphasis supplied), but contains no affirmative confirmation that *Perez* does now or may be expected to command a majority of the "entire" Court or even of the Court which participated in *Schneider*. The language and the ruling in *Schneider* necessarily cast great doubt on the "superior authority" of *Perez* upon which the Second Circuit here relied exclusively.

The equal division of this Court leaves standing the decision below which was reached reluctantly and only by the constraint of the "superior authority" of *Perez* rendered unreliable by that equal division and by the companion decision in *Schneider*. Absent the presumed compelling authority of *Perez*, the Second Circuit would have been free to yield to the "great force in the constitutional arguments presented by" Marks, and an equal division here would have then affirmed Marks' citizenship, not his alienage. The determination here as to Marks' nationality therefore rests upon a now unsettled state of authority, and the need for resolution upon rehearing is singularly great and appropriate.

Of course, not only Marks' citizenship is here at stake. Nationality is a matter of status. And the effect of expatriating action was held by the Court below to be automatic and not dependent upon notice, charges, hearing, or judgment. Whatever may be the effect of decision or non-decision by this Court in other areas which require implementation by administrative, civil, or criminal action before the full impact of such decision or non-decision may be felt, in matters of nationality judicial deadlock can be and is here immediately and directly unsettling. Those thousands who have or will come within the various statutes which expatriate absent voluntary renunciation of nationality and allegiance [see, *e.g.*, Immigration and Naturalization Service, Annual Report (1962) 101], now cannot know whether they are or are not American citizens. To leave unsettled such a crucial and fundamental aspect of men's lives is virtually intolerable. The petitioner has strenuously argued the unconstitutionality of § 349(a)(3); significant as such conclusion may be, it does not transcend the significance of the need for some settled conclusion by this Court after rehearing and reargument on the underlying constitutional issues here raised so that citizenship status may be known.

II.

The reasons for Mr. Justice Brennan's determination to take "no part in the consideration or decision of" *Marks* and to take "no part in the decision of" *Schneider* were not given and are not known to the petitioner. The language used for such determination suggests the restraints referred to in the Act of June 25, 1948, c. 646, 62 Stat. 908, 28 U. S. C. A. 455. The petitioner is, however, unaware of the presence in *Marks* of any of the disqualifying causes mentioned in that statute. We therefore assume that such cause did obtain in *Schneider*, and

that because of certain constitutional issues common to *Schneider* and *Marks*, Judge Brennan decided not to participate in the decision of either. *Cf. Hoag* v. *New Jersey*, 356 U. S. 464, 473; *Bartkus* v. *Illinois*, 355 U. S. 281; *Ladner* v. *United States*, 355 U. S. 282.

Schneider has now been decided. Mr. Justice Brennan's participation at this time in *Marks* can no longer affect the outcome of *Schneider*. Whatever the nature of Mr. Justice Brennan's derivative disqualification in *Marks* because of *Schneider* is now eliminated. In view of the Court's equal division here, and the necessity for Mr. Justice Brennan to take part in the decision of this case, rehearing should be granted to afford him the opportunity to do so. Precisely this procedure was followed under closely analogous circumstances in *Bartkus* v. *Illinois*, 356 U. S. 969, and *Ladner* v. *United States*, 356 U. S. 969.

Hoag v. *New Jersey*, *supra*, involved review of a decision of the New Jersey Supreme Court. Mr. Justice Brennan had participated in that decision as a dissenting judge while a member of the New Jersey Supreme Court. See 21 N. J. 496, 517. He accordingly declined to take part in the case upon the review in the United States Supreme Court. He also declined to participate in the related though distinguishable contemporaneous cases of *Bartkus* v. *Illinois*, 355 U. S. 281, and *Ladner* v. *United States*, 355 U. S. 282, which were both argued on the same day with *Hoag*. The other eight members of the Court were equally divided in *Bartkus* and *Ladner* and those two cases were therefore affirmed without opinion. When *Hoag* was thereafter decided, however, motions for rehearing were granted without dissent in *Bartkus* and *Ladner* (see 356 U. S. 969), and after reargument Mr. Justice Brennan participated in the decision of both cases, writing the majority opinion in *Ladner* v. *United States*, 358 U. S. 169, with only Mr. Justice Clark dissenting (358 U. S., at pp. 179-183), and a dissenting opinion in *Bartkus* v.

Illinois, 359 U. S. 121, at pp. 164-170, as one of four dissenters.

If Mr. Justice Brennan's abstention in *Marks* is attributable to *Schneider*, it is obligatory that the instant petition for rehearing be granted so that he may now participate in *Marks* and provide the margin of resolution and settlement of the great issues raised by this proceeding. The availability of a previously non-participating Justice has been the occasion for rehearing in other deadlocked cases prior to the adoption of Rule 58 (1) of this Court (*Gray* v. *Powell*, *supra*; *Halliburton Co.* v. *Walker*, *supra*), and since then (*Indian Towing Company* v. *United States*, *supra*; *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic Steamship Corp.*, *supra*). Mr. Justice Brennan's recent declaration of "felt doubts of the correctness of *Perez*, which I joined" (*Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 187), suggests that foreclosing Justice Brennan from participating in this case may be prejudicial and not just of academic interest to the petitioner; in any event, the urgent need for decision here renders this one of those "important and difficult cases" in which rehearing will have "enhanced the deliberative process." Mr. Justice Frankfurter, dissenting, *City of Detroit* v. *Murray Corp.*, 357 U. S. 913, 915.

CONCLUSION

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that upon further consideration the judgment of the United States Court of Appeals for the Second Circuit be reversed.

Respectfully submitted,

MURRAY A. GORDON,
Counsel for Petitioner.

Of Counsel:
EDMUND ALLEN ROSNER.

Certificate of Counsel

I, MURRAY A. GORDON, Esq., counsel for the above-named petitioner do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

MURRAY A. GORDON,
Counsel for Petitioner.